



## COVID -19

The following information is current as at Thursday 23 April 2020

### CHANGES TO RESIDENTIAL AND COMMERCIAL LEASES IN NSW

The nsw government has introduced legal measures to prevent certain classes of tenants from being evicted during the corona virus pandemic. The following provides a brief overview of the regulatory changes, and is aimed to assist both tenants and landlords understand what their entitlements and obligations are with regards to negotiating any possible rent deferral, waiver, relief, etc, over the coming months. The measures that have been introduced have been designed to encourage landlords and tenants to work together in a spirit of good faith and negotiation, and to maximise the continuity of the lease agreement whilst limiting social movement in order to minimise public health risks.

#### RESIDENTIAL TENANCY AGREEMENTS

Landlords will be **prohibited from evicting tenants** for rental arrears for a period of **60 days** commencing from 15 April 2020 if the tenant is able to establish that their household has been **financially impacted** by CoVid19. In such circumstances, the tenant will need to prove that one or more people in their household who pays rent has lost or has sustained reduced income due to corona virus, and that the weekly household income has been reduced by 25% or more. Proof may be in the form of an Employment Separation Certificate, payslips over several weeks, bank statements showing previous employment income and current income, etc.

Once the tenant can provide **reasonable proof**, whilst the landlord is not required to reduce the rent, they are **required to enter into negotiations** with the tenant based on good faith. Even though the NSW Civil and Administrative Tribunal (NCAT) will ultimately determine what constitutes 'good faith', we can accept that in the present context, it will likely include that the landlord must take into consideration information provided by the tenant about how the tenant's income has been reduced and what rent the tenant can reasonably offer and afford; the time that that reduced rent will commence from; together with providing reasons should the landlord not agree to the tenant's offer.

Although the Landlord might agree to reduce the rent for a certain period, e.g. for a 3 month period commencing from 1 April 2020, they are permitted to require that the **tenant pay the difference at a later date.**



Should the Landlord and Tenant however be unable to reach an agreement, either party may apply for a formal rent negotiation through the NSW Fair Trading's dispute resolution service. Whilst NSW Fair Trading cannot make a binding decision about the rent payment, they will assist the parties to negotiate.

Once the **60 day moratorium** that had previously been agreed to **expired**, the landlord may issue a 14 calendar day notice to terminate the lease agreement for rent arrears if the tenant is more than 14 days behind in their rent. For the following 6 months the landlord will only be permitted to issue a termination notice if the 60 day stop on the eviction has already expired; and the parties entered into a formal rent negotiation with NSW Fair Trading; and it is fair and reasonable in the circumstances to terminate the lease agreement. Should this situation arise, the landlord may proceed to NCAT for an order to terminate the lease agreement and to evict the tenant. In making such an order, NCAT may consider NSW Fair Trading's advice about whether either party refused a reasonable offer; any financial hardship sustained by either the landlord or tenant; whether the tenant has a particular vulnerability; public health concerns about keeping people in their homes, etc.

By way of example, Amir rents a 1 bedroom unit and pays \$350 in rent per week under the residential tenancy agreement. Amir earns \$650.00 per week, however lost his job due to his employer closing the business following public health orders. Amir starts receiving approximately \$700.00 per week in income support. This is paid through his employer. As Amir's income has now increased, the stop on a termination notice and an application for a stop on an eviction does not apply to him as there has been no reduction in Amir's total income.

It is however **important to remember** that at any stage during the 60 day stop and the longer 6 month restrictions, a Landlord is still permitted to apply to NCAT to take possession of their property in circumstances where they are suffering undue hardship.

Further, if a tenant is not financially impacted by corona virus, they will be expected to honour all terms of their existing lease agreement.

For further information on how residential tenants and landlords might be impacted, together with a useful flowchart summarising the above, please visit: <https://www.fairtrading.nsw.gov.au/resource-library/publications/coronavirus-covid-19/property/moratorium#example4>



## COMMERCIAL LEASE AGREEMENTS

Lessors and Lessees have been eagerly awaiting guidance from the NSW State Government on how to deal with rental issues that have arisen as a result of corona virus. A **National Cabinet Mandatory Code of Conduct** ('the Code') was announced by the Federal Government on 7 April 2020, and has provided clarity for some commercial/retail/office/industrial lease agreements. Any rent reduction should be proportionate to the lessee's decline in turnover so as to ensure that the financial burden is shared between the parties.

The Code will apply to small and medium sized commercial tenants whose annual turnover is less than \$50 million and are eligible for the Commonwealth Government's JobKeeper programme. Lessees may be eligible for the JobKeeper programme if they are able to estimate and establish that their monthly or quarterly turnover has or will likely fall by 30% or more, relative to their turnover in a corresponding period the year earlier.

The Government has however indicated that the principles that underpin the Code should be taken into consideration by **all** commercial lessors and lessees regardless of their annual turnover. As with residential lease agreements, commercial lessors and lessees are encouraged under the Code to act in **good faith** and **in a spirit of compromise** when participating in any negotiations.

**During negotiations**, the parties should assess the amount of rent reduction on a case-by-case basis by taking into account the reduction in the tenant's trade, e.g. whether or not the tenant's business is classified as an essential service. In doing so, the Code states that at least 50% of the total rent reduction should be in the form of a rent waiver, with the remaining 50% being a rent deferral. Further, should the lessor receive any benefit to defer any loan or interest payments, this should similarly be shared with the lessee. Lessors will not however be able to call upon any bond, bank guarantee or other form of security for the non-payment of rent during the period of the pandemic and/or a reasonable subsequent recovery period.

Where the parties are able to agree on a form of rent relief, the lessee **cannot be evicted** from the premises for a period of 6 months.

Should the parties however be unable to reach an agreement, the dispute may be referred to the NSW Small Business Commissioner for a non-binding mediation.

As with residential tenancies, if a commercial lessee is not financially impacted by corona virus, they will be expected to honour all terms of their existing lease agreement.

For further information on how commercial lessors and lessees might be impacted, please visit: <https://www.service.nsw.gov.au/campaign/covid-19-help-small-businesses/general-business-support>